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In the Supreme Court of the United States

OCTOBER TERM, 1950

No.

UNITED STATES OF AMERICA AND LEE ARENAS,
PETITIONERS

v.

JOHN W. PRESTON, OLIVER O. CLARK, AND
DAVID D. SALLEE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States and Lee Arenas, prays that a writ of certiorari issue to review the judgment entered on March 23, 1950, by the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The district court did not write an opinion. Its oral views are set forth in the record at pages 59-66, and its findings of fact and conclusions of law appear in the record at pages 40-48. The opinion of the court of appeals (R. 210-218) is reported at 181 F. 2d 62.

JURISDICTION

The judgment of the court of appeals, affirming in part the judgment of the district court, was entered on March 23, 1950 (R. 218-219). The jurisdiction of this Court is invoked under 28 U. S. C. sec. 1254(1).

QUESTION PRESENTED

Whether in a suit under the Act of August 15, 1894, as amended, to determine an Indian's right to certain land allotments, the district court has jurisdiction to impress a lien upon the allotted lands to secure the payment of attorney's fees and expenses and to enforce such lien by sale of a portion of the lands.

STATUTES INVOLVED

1. The 1894 Act (Act of August 15, 1894, 28 Stat. 286, 305, as amended by the Act of February 6, 1901, 31 Stat. 760, 25 U. S. C. sec. 345)[1] is as follows:

> All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of

[1] The jurisdictional provisions of this Act were incorporated in the Judicial Code, Sec. 24(24), 28 U.S.C. sec. 41(24) (1940 ed.), which was identical in scope with the 1894 Act as amended. *First Moon* v. *White Tail*, 270 U.S. 243, 245. They are now set forth in 28 U.S.C. sec. 1353. For brevity, these provisions will be hereinafter referred to as the 1894 Act.

> Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States; and said district courts are given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant); and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him * * *.

2. Pertinent portions of the Mission Indian Act of January 12, 1891, 26 Stat. 712, and of the General Allotment Act of February 8, 1887, 24 Stat. 388, as amended, are set forth in the Appendix, pp. 21-24, *infra*.

STATEMENT

Pursuant to the 1894 Act, quoted above, Lee Arenas, a member of the Palm Springs Band of the Mission Indians, instituted proceedings in the district court for the determination of his rights to trust patent allotments in the Palm Springs Indian Reservation. After extended litigation,[2]

[2] The course of the litigation is briefly as follows: The suit was filed in December 1940 (R. 6). The Government's motion for summary judgment of dismissal was granted on

his rights to certain of the allotments were established, the judgment in his favor having "the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him". 25 U. S. C. sec. 345.

Under the applicable statutes and the trust patents, the United States is obligated to hold the lands for a period of twenty-five years in trust for the sole use and benefit of the Indian allottee, and at the end of the trust period, which has not yet expired, to convey the lands in fee to the allottee or his heirs "discharged of said trust and free of all charge or incumbrance whatsoever." Section 5 of the Mission Indian Act of January 12, 1891, 26 Stat. 712, 713; Section 5 of the General Allotment Act of February 8, 1887, 24 Stat. 388, 389, 25 U. S. C. sec. 348, quoted *infra*, p. 22. To effectuate this obligation, the same sections make "absolutely null and void" any conveyance of or contract affecting the allotments executed during the trust period. In addition, the General Allotment Act specifies that the allotments shall not in any event become liable to the satisfaction of any debt con-

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March 6, 1942 (R. 7), and the dismissal was affirmed by the court of appeals. *Arenas* v. *United States*, 137 F. 2d 199 (C.A. 9). This Court reversed the judgment. *Arenas* v. *United States*, 322 U.S. 419. Upon trial the district court found Arenas to be entitled to four allotments claimed by him. *Arenas* v. *United States*, 60 F. Supp. 411 (S.D. Cal.). This judgment was affirmed by the court of appeals as to two allotments and reversed as to the other two. *United States* v. *Arenas*, 158 F. 2d 730 (C.A. 9). This Court denied petitions for writs of certiorari filed by both parties. *Arenas* v. *United States* and *United States* v. *Arenas*, 331 U.S. 842.

tracted prior to the issuance of the final patent in fee. Act of May 8, 1906, 34 Stat. 182, 25 U. S. C. sec. 349; Act of June 21, 1906, 34 Stat. 325, 327, 25 U. S. C. secs. 354 and 410 *infra*, pp. 22-24.

On October 21, 1947, after the judgment in the allotment proceeding had become final and pursuant to a reservation in the district court's judgment,[3] the attorneys for Arenas filed in the proceeding a petition seeking (1) a judgment against Arenas in an amount equal to 33⅓ per cent of the land value (which was alleged to be $1,000,000) as fees for services and in an additional amount for advances; (2) a lien upon the lands involved to secure the amounts found due; (3) sale of a portion of the property sufficient to satisfy the judgment, free from any restrictions upon alienation; and (4) if the property be not ordered sold, appointment of a receiver to manage the property and to pay the net income to the allottee and to respondents as the court might direct (R. 2-12). The United States, appearing specially after a show cause order had been issued (R. 13-14), moved to

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[3] The district court had retained jurisdiction "for the purpose of adjudicating the reasonable sums that shall be allowed and paid to the attorneys of record for plaintiff for their services rendered to him in this action and for expenses necessarily incurred by them in his behalf in the prosecution thereof, and for the purpose of making all necessary and proper orders, judgments and decrees for the securing and payment of all such sums so found due and owing by the plaintiff to said attorneys" (R. 13). Upon appeal, the Government's objections to this retention of jurisdiction were considered to be premature. *United States* v. *Arenas*, 158 F. 2d 730, 753 (C.A. 9).

dismiss the show cause order insofar as it and the underlying petition were directed toward the issuance of any order affecting in any way the restricted allotments or their management, on the ground that the court lacked jurisdiction to make any such order (R. 15-17). This motion to dismiss was denied (R. 27), and thereupon the United States, appearing specially on its own behalf and generally on behalf of Arenas, filed an answer (R. 28-38), alleging a governmental interest in the enforcement of the restrictions against alienation of the allotments (R. 28-29), and praying that, if respondents were entitled to any relief, it be limited to a personal money judgment against Arenas (R. 37).

After trial, the district court announced its decision that respondent attorneys were entitled to fees for services rendered and to reimbursement for costs advanced, and that a lien would be impressed upon the allotments and the proceeds therefrom as security (R. 64-66). It found that the value of the allotments was uncertain but, nevertheless, very substantial (R. 42). Judgment was entered providing for recovery from Arenas of a total of 22½ percent of the value of the allotted lands as fees for services rendered [4] and $258.67 as reimbursement for advances for expenses (R. 50-51). The judgment further provided that payment of the award

[4] Respondent Preston was awarded a fee of 12½% of the value, while respondents Clark and Sallee were collectively awarded a fee of 10% (R. 50-51).

be secured by an equitable lien upon the allotments, including "the entire interest in said lands in the hands of the United States of America," and upon 22½ percent of the income therefrom in excess of the reasonable operating expenses of the property and jurisdiction was retained for the purpose of enforcing the lien (R. 51-53).

Upon appeal,[5] the judgment was affirmed as to the basic issue of the court's power to impress a lien upon the restricted Indian's allotment to secure the payment of the fees and expenses of his attorneys and to sell the property to enforce such lien. The court below recognized (R. 212-214) that after issuance of the trust patent "the United States possesses a supervisory control over the land, and may take appropriate measures to make sure that it inures to the sole use and benefit of the allottee and his heirs * * *," *United States* v. *Bowling*, 256 U. S. 484, 487, and that the same control, which is exercised by the Department of the Interior, applies to an allotment established by court decree

[5] In addition to the appeal by the United States on its own behalf and on behalf of Arenas (R. 56), Arenas also appealed through private counsel (R. 54), this latter appeal being limited to the amount of the award (R. 208). That attorney, Mr. John J. Taheny, was subsequently replaced and by order of the court of appeals his fees and expenses were fixed at $4,960.98, and he was given a lien upon Arenas' interest in the allotted lands to secure such fees (R. 205-207). Upon motion by the United States, this order was set aside as null and void because the United States had not been given notice of the motion for substitution of attorneys and fixing of fees, it being indicated, however, that the attorney was free to proceed further in the district court. *Arenas* v. *Preston*, 181 F. 2d 68 (C.A. 9).

under the 1894 Act. Nevertheless, relying upon *United States* v. *Equitable Trust Co.*, 283 U. S. 738, the court of appeals reasoned that by the 1894 Act Congress had consented to the exercise of all equitable processes which included the award of attorneys' fees and the sale of a portion of the property to satisfy such award (R. 214-216). The court concluded, however, that the trial court had erred in failing to determine the dollar amount of such fees and the judgment was reversed and remanded for such determination, jurisdiction to be retained for the purpose of enforcing the lien (R. 217-218).

REASONS FOR GRANTING THE WRIT

1. The courts below have held that in order to satisfy respondents' claims against Arenas for attorneys' fees, the lands allotted to Lee Arenas can be disposed of by judicial sale, notwithstanding the express prohibitions of Congress forbidding such a sale. Congress has pledged its Indian ward that at the end of the trust period the United States would convey the allotted lands to him "free of all charge or incumbrance whatsoever." To guarantee this pledge Congress has imposed restrictions to prevent the sale of the land either voluntarily by the Indian or involuntarily through judicial process. It has provided in the clearest and most unmistakable language that any attempted conveyance of the lands "shall be absolutely null and void." Sec. 5 of the Mission Indian Act of January 12, 1891, 26 Stat. 712, 713; see also section 5 of the

General Allotment Act of February 8, 1887, 24 Stat. 388, 389, 25 U. S. C. sec. 348. It has further provided that "no lands acquired under the provisions of this Act shall, in any event, become liable to the satisfaction of any debt contracted prior to the issuing of the final patent in fee." Act of June 21, 1906, 34 Stat. 325, 327, 25 U. S. C. sec. 354. See also 25 U. S. C. secs. 349 and 410. In the broadest, most unequivocal terms, applying to every conceivable situation, Congress has forbidden any sale of the trust allotments and required that they be preserved for the allottee to be transferred to him intact when the trust period ends.

There is no exception from these prohibitions against sale. They nullify not only attempted conveyances by the Indian but also attempted involuntary conveyances such as tax sales (*United States* v. *Rickert,* 188 U. S. 432), mortgage foreclosures (*Drummond* v. *United States,* 324 U. S. 316) or sales to enforce judgment liens (*Mullen* v. *Simmons,* 234 U. S. 192). To prevent frustration of this Congressional policy, equitable defenses which might be available in suits between private parties to avoid attempted conveyances are inapplicable. Thus, a return of the proceeds the Indian may have received from the attempted conveyance is not a prerequisite to cancellation of a deed or mortgage (*Heckman* v. *United States,* 224 U. S. 413, 447), nor does the ordinary rule that a conveyance with warranty estops the grantor

when he afterwards acquires the land apply (*Starr* v. *Long Jim,* 227 U. S. 613, 625). Similarly doctrines of equitable estoppel, ratification, laches or bona fide purchase are no defense. *American Surety Co.* v. *United States,* 112 F. 2d 903, 906 (C.A. 10); *United States* v. *Gilbertson,* 111 F. 2d 978, 980 (C.A. 7).

The court of appeals apparently was moved to create a special exception in favor of attorneys' fees on its assumption that otherwise "the Indian without funds cannot have any part of his rightful allotment of land" (R. 216). There is nothing in the language or the legislative history of the 1894 Act, or in the policy considerations underlying the legislation, which furnishes any warrant for the creation of such an exception to the absolute bar against alienation of the restricted land of an Indian ward. The assumption that the Indian would otherwise be denied his rightful allotment is, we believe, contrary to experience. Although many suits have been brought in the period of more than fifty years since the 1894 Act became law, this is the first case, so far as we know, where a sale of the allotted land has been sought in order to secure the payment of attorneys' fees. Congress, from 1909 to 1921, made appropriations for the payment of the costs incurred by Indians in suits involving lands allotted to them, but it expressly provided that "no part of this appropriation shall be used in

the payment of attorney's fees." Act of March 3, 1909, 35 Stat. 781, 784.[6]

The creation by judicial construction of an exception to the unqualified Congressional prohibitions against sale also runs counter to the well settled principle that the jurisdiction conferred by a statute in which the United States consents to suit cannot be enlarged beyond the express terms of the Act. *Klamath Indians* v. *United States,* 296 U.S. 244, 250; *United States* v. *Sherwood,* 312 U.S. 584, 590; *United States* v. *New York Rayon Co.,* 329 U. S. 654, 659. The 1894 Act contains no consent to the invocation of "all equitable processes" including a power to sell the land, as held by the court below. Instead, the jurisdiction conferred was precisely limited to suits to determine an Indian's right to an allotment, with the Indian claimant as plaintiff and the United States as defendant. And the Act explicitly delimits the scope of the court's judgment by providing that it "shall have the same effect, when properly certified to the Secretary of the Interior, as if such an allotment had been allowed and approved by him." As was said in *Rambo* v. *United States,* 145 F. 2d 670, 671 (C.A. 5), certiorari denied, 324 U.S. 848, where a

[6] See also the Acts of April 4, 1910, 36 Stat. 269, 272; March 3, 1911, 36 Stat. 1058, 1061; August 24, 1912, 37 Stat. 518, 520-521; June 30, 1913, 38 Stat. 77, 80; August 1, 1914, 38 Stat. 582, 585; March 4, 1915, 38 Stat. 1228; May 18, 1916, 39 Stat. 123, 126-127; March 2, 1917, 39 Stat. 969, 972; May 25, 1918, 40 Stat. 561, 566; June 30, 1919, 41 Stat. 3, 7; February 14, 1920, 41 Stat. 408, 412; March 3, 1921, 41 Stat. 1225, 1229.

similar claim that the court was vested with general equity jurisdiction by a statute under which the United States consented to be sued was rejected:

> General equity jurisdiction is not conferred upon Federal Courts in suits against the Government, and the general rule is not applicable here because of the restrictions that Federal Courts have only such jurisdiction as the statute confers, and that a statute relaxing the immunity of the sovereign against suit must be strictly construed.

See also *Moreno* v. *United States*, 120 F. 2d 128 (C.A. 1); *Pack* v. *United States*, 176 F. 2d 770 (C. A. 9).

The reliance of the court below upon *United States* v. *Equitable Trust Co.*, 283 U. S. 738, is, we believe, misplaced. That case was originally instituted by the next friend of Jackson Barnett against third persons who had possession of Barnett's funds for the purpose of rescuing the funds which the Secretary had unlawfully released and permitted to be at large. The United States intervened in the pending suit, not as a defendant, but to aid the Indian and his representatives in securing the return of the funds. The United States did not seek to supplant the next friend and its petition for intervention prayed that the fund "after deducting the reasonable expenses of this litigation" be restored to the custody of the Secretary of the Interior. And later, it agreed to an order allowing the next friend's attorney $3,000 from the fund

to meet the expenses about to be incurred. It was these facts which led this Court to the conclusion that "the United States by its intervention and participation in the suit, consented, impliedly at least, that reasonable allowances be made from the fund * * *." 283 U. S. at p. 745. This conclusion does not support the holding of the court below that by the 1894 Act, Congress authorized the sale of a portion of the allotment.[7] Here the property was never in danger of dissipation: The only question was whether it was restricted tribal property or restricted individual Indian property.

Clearly, the *Equitable Trust* case turns on its own particular, unique facts. A reading of the opinion in that case plainly shows that the Court did not intend to modify or overrule the fundamental policy established by Congress that allotted lands shall not be sold but shall be preserved for the Indian until he is capable of managing his own affairs. This policy was reiterated by Congress both before and after the 1894 Act, and has always been rigorously enforced by the courts (see *supra*, pp. 8-10). This declared Congressional policy is

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[7] The court below agreed with the United States that *United States* v. *Anglin & Stevenson*, 145 F. 2d 622 (C.A. 10), certiorari denied, 324 U.S. 844, and *Anglin & Stevenson* v. *United States*, 160 F. 2d 670 (C.A. 10), certiorari denied, 331 U.S. 834, do not support respondents because the statute in that case consented to a judgment binding the United States "to the same extent as though no Indian land or question was involved," while the 1894 Act contained no express provision of this kind. For the same reason, the *Equitable Trust* case, which did not rest upon a consent statute at all, is inapposite.

clearly contradictory to the notion of the court below (R. 216) that a sale of a portion of the Indian's land to pay attorneys' fees represents a construction favorable to the protection of a dependent people, particularly when Congress during this period excluded attorneys' fees from the costs of litigation of the Indians for which it appropriated funds (see *supra,* pp. 10-11). When Congress believes that a particular claim for fees for attorneys who have prosecuted suits under the 1894 Act is meritorious, it has not permitted sale of the allotted land but has appropriated funds to pay the fees. Act of March 9, 1940, 54 Stat. 48; Act of June 30, 1913, 38 Stat. 77, 98; cf. Act of September 22, 1922, 42 Stat. 1048, 1053; Act of March 3, 1903, 32 Stat. 982, 995.[8] In those instances when Congress does permit the recovery of attorneys' fees in Indian matters or in other cases, it imposes severe limitations upon the amount that may be awarded for the protection of the beneficiaries of the judgment rather than simply authorizing the award of any amount the court may determine. Act of March 3, 1853, 10 Stat. 226, 239; Act of October 1, 1890, 26 Stat. 636, 637; Act of June 22, 1910, 36 Stat. 580, 581; Act of

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[8] It is, of course, perfectly clear that the United States did not, in the 1894 Act, subject itself to liability for attorneys' fees or other costs of the suit. *United States* v. *Arenas,* 158 F. 2d 730, 753 (C.A. 9), certiorari denied, 331 U.S. 842; *Reconstruction Finance Corp.* v. *Menihan Corp.,* 312 U.S. 81, 83; *United States* v. *Chemical Foundation,* 272 U.S. 1, 21; *United States* v. *Barker,* 2 Wheat. 395.

May 26, 1920, 41 Stat. 623, 625; Act of May 20, 1924, 43 Stat. 133, 134; Act of June 28, 1938, 52 Stat. 1209, 1211; Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 1053, 25 U. S. C. sec. 70n; Federal Tort Claims Act of August 2, 1946, 60 Stat. 842, 846, 28 U. S. C. sec. 2678; World War Veterans Act of March 4, 1925, 43 Stat. 1302, 1311, 38 U. S. C. sec. 551.

2. Thus far we have assumed that allowances of attorneys' fees to respondents here would be an appropriate exercise of general equity jurisdiction if Congress had given such a broad consent. However, it is clear that the general equitable principle, applied in the *Equitable Trust* case, that a trust fund which has been recovered or preserved may be charged with costs and expenses incurred to that end, does not govern the present situation. The application of the general principle is entirely proper in cases where a next friend prosecutes a successful action on behalf of an incompetent (as in the *Equitable Trust* situation), or where a party by his own efforts secures a fund in which others will share, the theory being that in fairness the party by whose efforts the fund has been secured should be reimbursed from the fund for his necessary expenses. *Sprague* v. *Ticonic Bank,* 307 U. S. 161; *Trustees* v. *Greenough,* 105 U. S. 527, 532-533; *Central Railroad* v. *Pettus,* 113 U. S. 116, 122-123; *Harrison* v. *Perea,* 168 U. S. 311, 325. And, although this right of reimbursement belongs to the party, in a proper case it may be exercised directly by his

attorney. *Central Railroad* v. *Pettus,* 113 U. S. 116, 124-125; *Colley* v. *Wolcott,* 187 Fed. 595, 596 (C. A. 8).

Here, however, the suit was instituted by Arenas himself (R. 164), not by a next friend. And, inasmuch as the purpose of the suit was to determine his exclusive right to certain lands, it was not brought for the benefit of others. Nor does the instant case involve an actual or threatened dissipation of trust property. The United States at all times acknowledged that it held the property in trust. The only issue was whether the lands were held in trust for the Palm Springs Band of Indians or for the individual Indian, who for a long period prior to the suit and up to the present has continuously enjoyed exclusive possession of the lands involved (Record in No. 463, October Term, 1943, pp. 9-14, 27-28). Moreover, since the 1894 Act, under which this suit was brought, conferred jurisdiction only to determine the claim to an allotment and then to certify the judgment to the Secretary of the Interior, who would then treat the allotment as though he himself had approved the selection, it is plain that in no sense can the lands be considered to have been in the control of the court. Cf. *Hoffman* v. *McClelland,* 264 U. S. 552, 558-559; *Davidson* v. *American Blower Co.,* 245 Fed. 773 (N. D. N. Y.).

There is, therefore, no basis here for application of the principle of equity that attorneys' fees and

expenses may be paid from a fund under the control of the court. *Standard Lumber Co.* v. *Interstate Trust Co.*, 82 F. 2d 346, 350 (C. A. 5), certiorari denied, 299 U. S. 545; *Weed* v. *Central of Georgia Ry. Co.*, 100 Fed. 162 (C. A. 5); *Kimball* v. *Atlantic States Life Ins. Co.*, 223 Fed. 463 (S. D. Ga.); *Davidson* v. *American Blower Co.*, 245 Fed. 773 (N. D. N. Y.); cf. *Central Railroad* v. *Pettus*, 113 U. S. 116, 124. On the other hand, it is clear that the original suit was in the nature of an ordinary proceeding in which it is the settled rule that the property in dispute will not be made liable for costs. *Hauenstein* v. *Lynham*, 100 U. S. 483, 491; *Oelrichs* v. *Spain*, 15 Wall. 211, 231; *Van Senden* v. *Wilkinson*, 76 F. 2d 151, 152 (C. A. D. C.). The instant proceeding by the allottee's attorneys is simply an attempt by the attorneys to collect their fee from their client, and can only be justified on the theory that the court should enforce an alleged attorney's lien on the judgment. *In re Gillaspie*, 190 Fed. 88, 90-91 (N. D. W. Va.). It is clear that respondents have no such lien, and the court below did not rule otherwise.[9]

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[9] This is clear from the ruling of the court below that the fee allowed should be the amount the court should consider reasonable, not an amount contracted for. Inasmuch as there is no common law charging lien in favor of attorneys, the federal courts follow state law in such matters. *Central Railroad* v. *Pettus*, 113 U.S. 116, 127; *German* v. *Universal Oil Products Co.*, 77 F. 2d 70, 72 (C.A. 8); *Webster* v. *Sweat*, 65 F. 2d 109, 110 (C.A. 5). In California, an attorney's charging lien is created only when the contract provides that "the lawyer is to look to the judgment he may secure as security for his fee." *Wagner* v. *Sariotti*, 56 Cal. App. 2d

3. The question here presented has great practical importance in the administration of Indian affairs. This is the first case in which a court has asserted the power to sell allotted lands, despite the express prohibitions enacted by Congress. If the decision below is permitted to stand, the door is open to the circumvention of the allotment policy and to the otherwise illegal disposition of allotments. Cf. *Mullen* v. *Simmons,* 234 U. S. 192, 199. This case is an example of what can happen. Under the decision below, a portion of Lee Arenas' allotments will be sold to satisfy his attorneys in the allotment proceeding, and another portion will be sold for the benefit of the first of two attorneys who represented him in the supplemental proceeding for fees (see *supra,* p. 7). Presumably, his second attorney in the supplemental proceeding will also be entitled to a lien on the allotments and a sale of still another portion. Conceivably, it would not be long before Lee Arenas would be in large measure stripped of his lands. And in the companion case in which a petition for writ of certiorari is filed (*United States and Eleuteria Brown Arenas* v. *John W. Preston, et al.*), the trial court based the amount of the fee involved in part upon

693, 697; 133 P. 2d 430, 432; cf. *Ex parte Kyle,* 1 Cal. 331; California Code of Civil Procedure, sec. 1021. In the instant case, the contract (R. 187-188) contains no such provision and, indeed, any such provision would necessarily be ineffective. Section 5 of the General Allotment Act, 25 U.S.C. sec. 348; cf. *Turner* v. *Woolworth,* 221 N.Y. 425, 429-430, 117 N.E. 814.

the services performed by respondents in the *Lee Arenas* case.[10]

After the decision in the *Lee Arenas* case became final, the Department of the Interior proceeded to allot lands to all of the members of the Palm Springs Band of Indians. Seventy-six allotments have been made upon the reservation at an estimated value of some $6,000,000 and many of these allotments have been accepted by individual Indians. However, respondents, on behalf of some of the members of the tribe, have prepared a different plan of allotment which conflicts in many respects with the plan of the Department of the Interior. Litigation is now pending in which respondents seek to compel adoption of their allotment plan and to raise a wide variety of other issues concerning such matters as the disposition of the income from reservation lands, the distribution of waters of the reservation, the location of streets and public utilities and similar problems. The probability that under the decision below portions of the allotments might be sold to satisfy claims for attorneys' fees

[10] Since the Indians probably will be unable to pay the attorney's fees, and since the attorneys are the most likely purchasers at a sale of the allotments, the practical effect of the ruling below may well be to turn a substantial portion of the Palm Springs Reservation over to the attorneys. Since these will be forced sales, the attorneys who will not have to pay cash may succeed in obtaining the land at bargain prices, and an unreasonably large portion of the allotments may have to be sold in order to realize sufficient cash to pay the attorney's fees. Such a combination of circumstances, which as a practical matter is not unlikely, would make a mockery of the statutory provisions designed to protect the "rights" of Indians in their ancestral lands.

for services rendered therein obviously tends to encourage such litigation and thus to promote confusion in administration.

CONCLUSION

For the reasons stated this petition for a writ of certiorari should be granted.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

JUNE 1950.

APPENDIX

Section 5 of the Mission Indian Act of January 12, 1891, 26 Stat. 712, 713, provides as follows:

> That upon the approval of the allotments provided for in the preceding section by the Secretary of the Interior he shall cause patents to issue therefor in the name of the allottees, which shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State of California, and that at the expiration of said period the United States will convey the same by patent to the said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided,* That these patents, when issued, shall override the patent authorized to be issued to the band or village as aforesaid, and shall separate the individual allotment from the lands held in common, which proviso shall be incorporated in each of the village patents.

Section 5 of the General Allotment Act of February 8, 1887, 24 Stat. 388, 389, 25 U.S.C. 348, provides:

> That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided,* That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: * * *

Section 6 of the General Allotment Act as amended by the Act of May 8, 1906, 34 Stat. 182, 25 U.S.C. sec. 349, provides:

> That at the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in sec-

> tion five of this Act, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law * * * *Provided,* That the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: *Provided further,* That until the issuance of fee-simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States: * * *

The Act of June 21, 1906, 34 Stat. 325, 327, 25 U.S.C. secs. 354 and 410, adds the following provisions to the General Allotment Act:

> No lands acquired under the provisions of this Act shall, in any event, become liable to the satisfaction of any debt contracted prior to the issuing of the final patent in fee therefor.
>
> That no money accruing from any lease or sale of lands held in trust by the United States for any Indian shall become liable for the payment of any debt of, or claim against, such In-

dian contracted or arising during such trust period, or, in case of a minor, during his minority, except with the approval and consent of the Secretary of the Interior.

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IN THE

Supreme Court of the United States

October Term, 1950.

No. 139.

UNITED STATES OF AMERICA and ELEUTERIA BROWN ARENAS, also know as DELLA NICHOLSON,

Petitioners,

vs.

JOHN W. PRESTON, OLIVER O. CLARK, and DAVID D. SALLEE,

Respondents.

Brief of Respondents in Opposition to the Petition for a Writ of Certiorari.

Opinions Below.

The District Court did not write an opinion. The opinion of the Court of Appeals is reported in 181 F. 2d 69.

Jurisdiction.

The District Court had jurisdiction under 25 U. S. C. A., Section 345 and 28 U. S. C. A., Section 1353. The Court of Appeals had jurisdiction under 28 U. S. C. A., Section 1291. This Court may, but should not, review the judgment under 28 U. S. C. A., Section 1254(1).

Statement.

The same questions of law are presented in this case as in the companion case of *United States and Lee Arenas v. John W. Preston, et al.* The parties are the same in each case, except the Indian allottee. The facts are stated in the petition, pages 2-4. The differences in the facts are negligible, and in no way require different application of the rules of law stated in respondents' brief in the *Lee Arenas* case.

Conclusion.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

JOHN W. PRESTON,
OLIVER O. CLARK,
By JOHN W. PRESTON,
Counsel for Respondents.

End